(7)

No. 91-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CITY OF CINCINNATI,
Petitioner,

v.

DISCOVERY NETWORK, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; AFFILIATED PUBLICATIONS, INC.; THE COPLEY PRESS, INC.; DONREY MEDIA GROUP; DOW JONES & COMPANY, INC.; GANNETT CO., INC.; LANDMARK COMMUNICATIONS, INC.; OTTAWAY NEWSPAPERS, INC.; SEATTLE TIMES COMPANY; THOMSON NEWSPAPERS HOLDINGS, INC.; AND TRIBUNE COMPANY IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

This brief is submitted in support of Respondents Discovery Network, Inc. and Harmon Publishing Co.[1] Amici curiae represent approximately 90 percent of all daily

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[1] Under Supreme Court Rule 36, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

newspapers in the United States. More than 62 million newspapers are circulated in the United States daily, and an increasing number—currently more than 16 million newspapers daily—are sold to readers who rely on single copy purchases, as opposed to home-delivered newspaper subscriptions. Nearly half of these—7.7 million—are distributed through more than 600,000 newspaper vending machines, commonly known as newsracks.

In one sense, these amici newspaper publishers are competitors for the newsrack space that was denied to Respondents by the Cincinnati ordinance at issue. However, amici have a broader interest. The nation's newspapers have a continuing commitment to preserving First Amendment protection for all forms of lawful speech, including the commercial speech of Respondents at issue here, and have often appeared before the Court to urge the broadest protection for both commercial speech and newspaper distribution.

As a result of changing lifestyles and readership habits, newsracks are an increasingly vital link between newspapers and readers. They have also become a modern-day community "bulletin board" of immediate news and information to purchasers and passers-by alike. Amici curiae therefore support Respondents' challenge to what appears to be an unnecessary ban of commercial newsracks by the City of Cincinnati.

At the same time, amici find themselves in the unfamiliar role of occupying a middle ground on constitutional issues as framed by the parties and other participants in this case. Although amici strongly disagree with those who argue that all newsracks or all "commercial publications" may be banned from public streets, they do not share the Court of Appeals' view that distribution of purely commercial speech demands the same level of First Amendment protection as daily news. Amici believe that the tension between the cities' legitimate need to manage

the public streets, on the one hand, and the public's constitutional right to use the streets for traditional First Amendment purposes, on the other, can be accommodated without resort to either extreme, under constitutional principles well established in the prior decisions of this Court. Amici respectfully urge the Court to adhere to those principles and to insist that the City of Cincinnati meet its burdens under the First Amendment before restricting Respondents' right to disseminate their publications.

INTERESTS OF THE INDIVIDUAL AMICI CURIAE

American Newspaper Publishers Association ("ANPA")[2] is a national trade association representing approximately 1,300 newspapers throughout the United States. Its membership constitutes approximately 90% of the nation's total daily and Sunday newspaper circulation and a substantial portion of its weekly newspaper circulation.

Affiliated Publications, Inc., through its subsidiary Globe Newspaper Company, publishes *The Boston Globe* and deploys approximately 3,000 newsracks in the Boston metropolitan area, which account for the sale of more than 14,000 newspapers daily.

The Copley Press, Inc., publishes ten daily newspapers in California and Illinois, whose combined circulation is approximately 750,000. At its largest newspaper, *The San Diego Union-Tribune*, 4,400 newsracks account for 12 percent of daily sales.

Donrey Media Group publishes 53 daily newspapers and a large number of weeklies. The Donrey newspapers have an average daily paid circulation of 804,567, approximately 94,391, or 12 percent, of which are sold through newsracks.

Dow Jones & Company, Inc., publishes the nation's largest circulation daily newspaper, *The Wall Street Jour-*

[2] ANPA will become the Newspaper Association of America (NAA) on June 1, 1992.

nal, which distributes more than 1.8 million copies daily. Dow Jones distributes thousands of its newspapers daily from approximately 22,500 newsracks. In Cincinnati alone, more than one quarter of its *Wall Street Journal* circulation is through newsracks.

Gannett Co., Inc., publishes 81 daily and a variety of nondaily newspapers. The total circulation of the 81 daily newspapers amounts to over 6.2 million readers, including *USA Today* and the *Cincinnati Enquirer*. *USA Today*, with an average daily circulation of over 1.9 million newspapers, sells over half a million newspapers daily from newsracks. Out of an average daily circulation of about 200,000 newspapers, the *Cincinnati Enquirer* distributes nearly 30,000 newspapers via newsracks.

Landmark Communications, Inc. and its subsidiaries publish eight daily newspapers, having a daily circulation of over 535,000 copies and a Sunday circulation of over 591,000 copies. On a daily basis, 63,476 copies are distributed by newsracks and on Sunday, the total newsrack distribution is 95,174.

Ottaway Newspapers, Inc., a wholly-owned subsidiary of amicus Dow Jones, publishes a group of 22 newspapers in 12 states, with a total average circulation of more than 565,000, and a number of non-daily publications. Newsrack sales average 120,000 copies daily and 165,000 copies on Sunday.

Seattle Times Company publishes *The Seattle Times* newspaper, with the largest combined daily and Sunday circulation in the Pacific Northwest, and also publishes two other daily newspapers and three thrice-weekly newspapers in the State of Washington.

Thomson Newspapers Holdings, Inc., with headquarters in Des Plaines, Illinois, publishes 123 daily newspapers and 41 weekly newspapers in 33 states. These newspapers are located in "small-town America," with the largest circulation being 80,000, and the majority of newspapers

falling in the 15,000 to 25,000 circulation range. Total paid daily circulation in the United States within the Thomson group is 2,257,000. Newsracks are an important distribution tool, with approximately 16,700 in use across the country, through which an average of 5.4 percent of the company's daily circulation is sold.

Tribune Company publishes the *Chicago Tribune*, *The Orlando Sentinel*, the Fort Lauderdale *Sun-Sentinel*, and four other daily newspapers, with a total daily circulation of 1,498,842. Approximately 14 percent of the *Chicago Tribune's* daily circulation of 733,775 is sold through newsracks.

SUMMARY OF ARGUMENT

The balance that must be struck between the cities' interest in aesthetics and safety of the public streets, and the public's right to receive news and information on those same streets is challenging, but the constitutional principles to be applied are clear.

The right to distribute and receive news and information, even purely commercial information, is protected under the First Amendment, and public streets are traditional public forums for distribution of news and information.

Newsracks are an essential means of newspaper distribution today, and serve a public purpose in making news and information available to purchasers and non-purchasers alike in a manner that is integral to the traditional and intended uses of public streets.

Under the First Amendment newspapers cannot be categorically banned from the public streets. However, they may be restricted under time, place, or manner and, when applicable, commercial speech regulations that meet the constitutional standards established by this Court. If scarce newsrack space must be allocated, the First Amendment permits, even encourages, preference to the traditional position of daily newspapers in the "quintessential" forum of the public streets.

ARGUMENT

I. NEWSRACK DISTRIBUTION OF NEWS AND INFORMATION IS PROTECTED UNDER THE FIRST AMENDMENT

A. Distribution of News and Information Is at the Core of the First Amendment

The First Amendment protects more than the simple freedom to speak and write; the framers of the Constitution were concerned with the unrestricted exchange of ideas and information. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 547 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Underlying the First Amendment is the concept that in order to best exercise the choices afforded by democracy, the public must have access to the widest array of information. *New York Times Co. v. Sullivan*, *supra* at 266; *Marsh v. Alabama*, 326 U.S. 501, 508 (1946); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The central role of the press in this equation has long been recognized by the Court.[3] The press not only acts as a surrogate for the public in gathering and reporting news of government affairs and current events; it also informs opinion and stimulates debate essential to self-governance.[4] Newspapers in particular—with their diverse mix of news, opinion, and analysis of matters of

[3] *See, e.g., Associated Press v. U.S.*, 326 U.S. 1, 20 (1945) ("[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.").

[4] *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (the press is "one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.").

public concern—epitomize what the First Amendment was designed to protect.

The Court has also long recognized that "[t]his freedom embraces the right to distribute literature, [citation omitted] and necessarily protects the right to receive it." *Martin v. Struthers*, 319 U.S. 141, 143 (1943). *See also, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

The right of the press to disseminate information does not merely extend from the public's right to receive it, but is guaranteed directly by the First Amendment. As the Court noted more than a century ago:

> Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.

In Re Jackson, 96 U.S. 727, 733 (1878); and, more recently, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 799-800 (1978):

> The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and "comprehends every sort of publication which affords a vehicle of information and opinion."

(quoting, *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). *See also, Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 768 (1988) ("the circulation of newspapers . . . is constitutionally protected."). Thus, the Court has consistently upheld the right to distribute against attempts to regulate in the interests of aesthetics or safety. *See e.g., Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (municipal ordinance giving broad discretion to deny newsrack permits);[5] *Schneider v. State*, 308 U.S.

[5] Lower court cases decided since *Lakewood* have continued to acknowledge the importance of newsracks as a means of distribution

147 (1939) (municipal ordinance prohibiting distribution of leaflets on public streets); *Lovell v. Griffin*, 303 U.S. 444 (1938) (municipal ordinance requiring a permit to distribute literature of any kind held facially invalid).

The protected right to distribute is not diminished simply because a newspaper or publication is sold, rather than given away, or because the message is economically motivated. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.").

B. Public Streets Are Traditional Public Forums for Distribution of News and Information

The right of the State to restrict expressive activity is "sharply circumscribed" by the First Amendment, particularly when the activity takes place in a traditional public forum. Restrictions must be content-neutral, "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

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and have protected newsracks against overly restrictive or unreasonable regulations. *See, e.g., Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991); *Miami Herald Publishing Co. v. Hallandale*, 19 Med. L. Rptr. 1927 (Fla. Cir. Ct. 1992); *Multimedia Publishing Co. v. Greenville Spartanburg Airport District*, 774 F. Supp. 977 (D.S.C. 1991); *Kentucky v. Lexington-Herald Leader*, 19 Med. L. Rptr. 1966 (Ky. Dist. Ct. 1991); *Jacobsen v. Petersen*, 728 F. Supp. 1415 (D.S.D. 1990); *Phoenix Newspapers Inc. v. Tucson Airport Authority*, 16 Med. L. Rptr. 1699, *aff'd*, 922 F.2d 845 (9th Cir. 1991); *Chicago Tribune Co. v. City of Chicago*, 705 F. Supp. 1345 (N.D. Ill. 1989); *Sebago Inc. v. Alameda*, 211 Cal. App. 3d 1372, 259 Cal. Rptr. 918 (Cal. Ct. App. 1989); *Chicago Newspaper Publisher's Assn. v. City of Wheaton*, 697 F. Supp. 1464 (N.D. Ill. 1988); *Jacobsen v. Filler*, 15 Med. L. Rptr. 1705 (D. Ariz. 1988). *But see, Gannett Satellite Info. Network, Inc. v. Berger*, 716 F. Supp. 140 (D.N.J. 1989), *aff'd in part, rev'd in part*, 894 F.2d 61 (3rd Cir. 1990).

Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). If a public forum restriction *is* content-based, the State must show further that it is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* Traditional public forums thus occupy a "special position in terms of First Amendment protection. . . ." *United States v. Grace*, 461 U.S. 171, 180 (1983).

Public streets and parks are "quintessential" public forums, *Perry*, 460 U.S. at 45; *Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *United States v. Grace*, 461 U.S. at 177, and their historical importance in the free exercise of expressive activity has long been recognized. *See e.g., Hague v. C.I.O.*, 307 U.S. 496, 515 (1939); *Schneider v. State*, 308 U.S. at 163; *Grace*, 461 U.S. at 177. In *Hague*, for example, the Court stated that public streets and parks have:

> immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Hague, 307 U.S. at 515. Distribution of newspapers on public streets and sidewalks is every bit as much a part of these traditional public forum activities and therefore must be afforded First Amendment protection:

> [T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Schneider v. State, 308 U.S. 147, 163 (1939).

C. Newsracks Serve a Public Purpose Consistent With the Traditional and Intended Use of Public Streets

Newspapers have been distributed on American streets and sidewalks since before the Constitution.[6] From the

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[6] *See* W. Thorn & M. Pfeil, *Newspaper Circulation: Marketing the News*, 35-39 (1987); Whisant, "Selling the Gospel News, Or:

nineteenth century until after World War II, most cities were filled with news hawkers or "newsies" selling newspapers on the streets and sidewalks—outside banks, stores, government buildings, in front of subway, bus and train stations—wherever pedestrian traffic was present.[7] An historian describing this era noted that "the newsies shouting the headlines were as much a part of the urban street scene as the lampposts on every corner." [8]

Even prior to the colorful era of the "newsies," in the early 1800's newspaper publishers displayed news bulletins on boards nailed to their office doors, for passers-by in the streets to stop and read. This tradition of news posting, and this public "bulletin board," became an important part of American news dissemination.[9]

Modern-day newsracks are the contemporary evolution and combination of the "newsies" and the public bulletin board. Newsracks evolved from the enterprise of news hawkers who slung bags of newspapers on lampposts, with "trust" pouches for the coins of buyers. Today, it is newsracks that "sell" millions of daily newspapers to the public as they pass through the streets, and serve as a bulletin board to millions more who stop to "catch up on the news" and read the headlines through the display windows of the newsracks.[10]

Amici curiae U.S. Conference of Mayors argue that allowing newsracks on public streets and sidewalks condones a private use of public property that is somehow inconsistent with the "intended use" of the public streets. *See* Brief of U.S. Conference of Mayors at 7. The

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The Strange Career of Jimmy Brown the Newsboy," 5 *J. Soc. Hist.* 269, 273 (1972); F. Mott, *American Journalism: A History 1690-1960* 106 (3d ed. 1967).

[7] D. Nasaw, *Children of the City* 78-79 (1985).

[8] D. Nasaw, *supra* note 7, at 78.

[9] J. Lee, *History of American Journalism* 159 (rev. ed. 1923).

[10] A. Lee, *The Daily Newspaper in America: The Evolution of a Social Instrument*, 299-300 (1973).

argument fails on two counts: first, as shown above, newsracks serve a public purpose entirely consistent with the traditional and intended use of the streets; and second, the placement of newsracks on sidewalks is simply not a private "taking" of public property.

Newsrack operators claim no title to public property. The existence of newsracks does not diminish the public's right to use the streets and sidewalks, nor is it inconsistent with that use. Instead, as discussed above, the availability of newspapers is an integral part of the traditional patterns of public use of the streets. Where it can be shown that newsracks significantly interfere with the public's use of the streets, they can be, and are, regulated to alleviate the particular problem. Newsracks are not permanent structures; they can be moved and are subject to regulation of their size, design, and placement, if necessary.[11]

D. Newsracks Are an Essential Means of Newspaper Distribution Today

Changing demographics and the news habits of modern society have greatly increased the importance of single-copy sales of newspapers and encouraged the development of modern-day newsracks. Newsracks have replaced not only the familiar city news hawkers, they are increasingly replacing the traditional clapboard-sided newsstands that are disappearing in American cities.[12] Unlike most newsstands and retail stores, which close at night, newsracks remain an effective vehicle to showcase the news and efficiently distribute the newspaper to passers-by around the clock.

Just as the development of motorized transportation revolutionized the distribution of newspapers early in the century and led to the current dominance of home-delivered circulation, changing patterns in public demand have made the availability of single-copy newspaper pur-

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[11] See discussion at pp. 22-28, *infra*.

[12] C. Rambo, "Single-Copy Sales," *Presstime* 6 (July, 1984).

chase, and thus newsracks, increasingly important. Currently, more than 62 million daily newspapers circulate each weekday. Of that number, over 16 million are distributed by single-copy sales through newsracks, newsstands or stores, with 7.7 million (46%) of single-copy sales coming from newsracks.[13] Developed in its present form more than 35 years ago,[14] newsrack circulation has continued to increase sharply nationwide. For example, while newsracks accounted for only 19% of daily single-copy sales in 1982, the portion had grown to 46% by 1991.[15]

This growth in newsrack distribution is attributable to several factors. First, there are many readers who either do not have access to home delivery of a particular newspaper or who choose not to receive home delivery for reasons of flexibility, convenience, or expense.[16] Second, with the variety of newspapers available today,[17] many readers who subscribe to one newspaper are also reading

[13] *See* International Circulation Managers Association, "Single-Copy Sales Become Larger Piece of Sales and Revenue Pie," *ICMA Update* 1-2 (June, 1991).

[14] M. Graczyk, "It's the 30th Birthday of Coin-operated Newsracks," *Presstime* 32 (Feb., 1987).

[15] *See* Newspaper Advertising Bureau, Inc., *Research Report: Circulation and Home Delivery Patterns* 37 (Nov., 1983); Newspaper Advertising Bureau, Inc., *Home Delivery and Single Copy Buying: Results From a National Survey* 41-55 (1988); International Circulation Managers Association, "Single-Copy Sales Become Larger Piece of Sales *and* Revenue Pie," *ICMA Update* 2 (June, 1991).

[16] Daily home delivery falls below the 50% mark for a number of demographic groups, including those with family incomes below $10,000, the unmarried, renters, and those under 30. *See* Newspaper Advertising Bureau, Inc., *Research Report: Circulation and Home Delivery Patterns* 5-6 (Nov., 1983).

[17] Readers typically have a choice between: a metropolitan newspaper, published in major cities; a national newspaper such as *The Wall Street Journal, USA Today,* or the *New York Times*; a suburban or local newspaper focussed on readers' local communities; or specialty newspapers geared towards specialized interests.

a second, to get another point of view or coverage of specific areas of interest. Typically, this second newspaper is purchased directly, by single copy, rather than by subscription. Third, reading habits have changed. Most urban commuters, for example, seem to prefer buying their newspaper at work or on the way to or from work. Young adults forego home delivery in favor of the flexibility of choosing when to read the paper and which newspaper to read.[18] Still other readers buy newspapers only when newsworthy events or headlines draw their attention.[19] Together, these various groups have created increased demand for single copy availability of newspapers and the convenience of newsracks as a source of distribution.

No fungible substitutes exist for newsracks today. They make newspapers readily available to those who are most likely to purchase them on a single copy basis. No other distribution outlet is as efficient in meeting the demands of the public.[20] As noted, the familiar newsstands of the

[18] W. Thorn & M. Pfeil, *Newspaper Circulation: Marketing the News* 271-72 (1987); C. Rambo, "Single Copy Sales," *Presstime* 6 (July, 1984).

[19] But single-copy purchasers are habitual newspaper readers. Studies show that seven of ten single-copy readers purchase at least one newspaper every day. *See* C. Rambo, "Single-Copy Sales," *Presstime* 6 (July, 1984). Many of these readers choose to buy the newspapers on the street even though they live in areas regularly served by home delivery dealers. *See* Newspaper Advertising Bureau, Inc. *Research Note: The Marketing Value of Single-copy Buyers* 9-10 (Oct., 1988). Ruth Clark, President of an Englewood Cliffs, New Jersey research firm, was quoted in *Creative Marketing Strategies* as saying:

> [Newspapers] are the last home-delivered product in America. Gone is the . . . milkman, even the Avon lady . . . . Like it or not, the single-copy purchaser is here to stay and is going to increase in numbers.

American Newspaper Publishers Association, *Creative Marketing Strategies* 1 (Oct., 1986).

[20] The Court itself has recognized the "effectiveness of the newsrack as a means of distribution." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. at 762 (1988).

past are a disappearing breed.[21] While grocery and convenience stores sell significant numbers of single-copy newspapers, many are closed for substantial parts of the day, and their population is declining in the typical urban core. The combined newsstand and store sale dominance of single-copy sales (81% in 1984) had dropped to 54% in 1991, with newsracks increasing as a source from 19% to 46% in the same period.[22]

In addition, many retail outlets have limited shelf and floor space for newspapers (typically not readily viewable by passers-by), which means that only selected newspapers will be carried. Out-of-town newspapers, newspapers offering a contrasting viewpoint, or newspapers that are not generally popular, risk being excluded.[23]

As discussed above, 26.87% of American newspaper buyers currently rely on single-copy sales of newspapers, and newsracks are currently the means by which almost half of those buyers acquire their newspapers. The proportion is rising, and no other available distribution method can accommodate the increasing demands of the public for single-copy newspaper purchase as effectively.

E. A Categorical Ban of Newsracks From Public Streets Is Impermissible Under the First Amendment

Banning newsracks from public streets would effectively prohibit the distribution of newspapers in many urban areas. To say that newsracks are the modern equivalent of the historic newsboy or newsstand is not merely a metaphor; changes in labor laws and demographics have made distribution by newsboys or newsstands all but impossible in many urban areas, and newsracks are often

[21] C. Rambo, "Single-Copy Sales," *Presstime* 6 (July, 1984).

[22] *See* note 15, *supra*.

[23] *See Chicago Newspaper Publishers Ass'n v. City of Wheaton*, 697 F. Supp. 1464, 1470 (N.D. Ill. 1988) (private sellers not an adequate alternative to newsrack distribution because availability subject to sellers' discretion is too transitory).

the most efficient way to meet the public's ever-increasing demand for single-copy newspaper purchase in urban centers. The protected right of general circulation has never been doubted, yet this right would be rendered meaningless in many areas if newsracks were banned in disregard of the reality of modern day demographics and readership demand.

The need to assess the existence of *realistic* alternative means of distribution has been recognized by the Court. *See, e.g., Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977), (although in theory sellers of homes were free to employ alternatives to lawn signs, in practice the alternatives were not satisfactory). In order to fulfill its task of assessing the First Amendment interests at stake and weighing them against the public interest alleged, the Court must carefully examine the effect a ban would have on communication. *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 503 (1981).[24]

In the case of newsracks, a substantial limitation would foreclose the means by which millions of Americans buy newspapers each day. The overwhelming public demand for single-copy purchase of newspapers has increased rapidly in the past decade and is uniformly projected to increase in the future. For this reason alone, the Court should not accept the simplistic invitation of the amici cities[25] to declare constitutional a hypothetical ban on all newsracks, without a fully developed record involving careful consideration of the impact on traditional daily newspaper distribution across the country.

[24] In *Metromedia*, with respect to billboards, the Court stated that a court must assess the First Amendment interest at stake and weigh it against the public interest allegedly served by the regulation. The Court noted that "[p]erformance of this task requires a particularized inquiry into the nature of the conflicting interests at stake here, beginning with a precise appraisal of the character of the ordinance as it affects communication." *Metromedia*, 453 U.S. at 502-503.

[25] Brief of U.S. Conference of Mayors, at 12-14.

The amici cities cite several cases to support their proposal that newsracks can be banned from the public streets, but these cases involved circumstances that are distinctly different from those before the Court, and none address the role of newspapers in the public forum.[26]

The cities also rely on *City Council v. Taxpayers For Vincent*, 466 U.S. 789 (1984), *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), and on the dissenting opinion in *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988) (White, J., dissenting). While these opinions are closer to this case, in that they at least deal with the same general subject matter, the cities' reliance on them in support of a total ban of newsracks is misdirected.

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[26] Amici cite *Adderly v. Florida*, 385 U.S. 39, 47 (1966), for the generally accurate proposition that the government has the power to preserve the property under its control for the use to which it is lawfully dedicated. However, *Adderly* addressed the asserted right to demonstrate on the secured and non-public premises of a county jail—clearly not intended for the interchange of ideas but for security purposes. Similarly, amici cite *Pell v. Procunier*, 417 U.S. 817, 833-834 (1974), which concerned whether the state was required to allow face-to-face interviews between state prison inmates and the press, even though such interviews were not available to the general public.

Amici also cite *Breard v. Alexandria*, 341 U.S. 622, 642 (1951), for its statement that the First Amendment "does not mean one can talk or distribute where, when and how one chooses." *Breard*, however, concerned a city ordinance prohibiting peddlers and canvassers from soliciting from the occupants of private residences. Equally inapplicable to the present case is *Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983), where the Court held only that Congress' decision not to subsidize a lobbying group with public funds did not violate the First Amendment. Finally, both *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) and *United States v. Kokinda*, 497 U.S. ——, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) are cited by amici for the proposition that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Greenburgh*, 453 U.S. at 129. However, *Greenburgh* and *Kokinda* involved, respectively, access to non-public postal letter boxes, and solicitation on the sidewalks adjoining post offices. In both cases the forums were held to be *nonpublic*.

The Court's decision in *Metromedia* involved billboards on private property, a different medium of expression in a different forum. As the Court has stated, "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). In *Metromedia* the Court noted that billboards are "large, immobile, and permanent structure[s]," and they create "a unique set of problems. . . ." *Metromedia*, 453 U.S. at 502.

In his dissenting opinion in *Metromedia*, Chief Justice Burger, although willing to ban billboards, recognized constitutional differences between media:

> The uniqueness of the medium, the availability of alternative means of communication, and the public interest the regulation serves are important factors to be weighed; and the balance very well may shift when attention is turned from one medium to another.

Metromedia, 453 U.S. at 557-558 (Burger, C.J., dissenting. Noting newspapers in particular, he concluded that "[r]egulating newspapers . . . is vastly different from regulating billboards." *Id.* at 558. Thus, while even a total ban of billboards may have been considered by the Court in *Metromedia*, it is neither necessary nor appropriate with respect to newsracks. In simple terms, *Metromedia* did not involve a traditional historic use of the public forum.

Similarly, in *Taxpayers for Vincent* the utility poles at issue were held not to be public forums, and the Court specifically noted that the public forum doctrine did not apply. *Vincent*, 466 U.S. at 814. The Court held that the appellees had failed to demonstrate the existence of a "traditional right of access" to such items as utility poles for the purpose of communication. *Id.* The Court further stated that the posting of political posters on public property was not "a uniquely valuable or important mode of communication. . . ." *Id.* at 812. Moreover, the use of

the utility poles as a means to communicate was held to be inconsistent with the functional use of utility poles. In contrast, newspapers historically have been considered both a unique and valuable mode of communication in public streets, fully consistent and historically intertwined with the purposes of these traditional public forums.

It should also be noted that while the Court in *Vincent* upheld the ordinance, it recognized the importance of carefully assessing the adequacy of alternative modes of communication: "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Id.* The Court stated that there were no findings indicating that appellees' ability to communicate effectively was being threatened by "ever-increasing restrictions on expression." *Id.* The Court also found that adequate alternative channels of communication were available. *Vincent*, 466 U.S. at 815. Vincent thus upheld a ban in circumstances wholly different from those in the present case.

The cities' reliance on the dissenting opinion in *Lakewood* is also misguided. In a narrow ruling, the Court in *Lakewood* recognized the importance of newspaper distribution and struck down an ordinance giving the mayor broad discretion to deny permits for newsracks. *Lakewood*, 486 U.S. at 772. The dissent in *Lakewood* focussed primarily on the procedural issue of whether a facial challenge to the newsrack ordinance in question was proper. The constitutionality of an outright ban on newsracks was expressly *not* addressed by the Court. 486 U.S. at 773 (White, J., dissenting.)

In addition, the dissenting argument relied heavily on the "ample alternative channels" available for distributing newspapers in Lakewood, including the district court's finding that no person in Lakewood lived more than a quarter-mile from a twenty-four hour newspaper outlet. *Id.* at 783. In fact, the dissent concluded that the newsracks at issue would not affect the newspaper's circulation in Lakewood by more than one or two percent. *Id.* at 792. Thus, the analysis of the dissenting Justices in *Lakewood* should be set in, and limited to, the appropriate context: their opinion was based on a specific factual record that cannot be generalized to support a ban of newsracks in other contexts. While the dissenting Justices might have believed that alternatives to newsracks were available in the suburb of Lakewood, the same is not necessarily true in other suburban settings, and it is certainly not true in the urban centers of America. Any observations and conclusions drawn from the circumstances and opinions in *Lakewood* should therefore be applied with great caution to this or any other case.

Despite the cities' attempts to prove otherwise, the fact remains that newsracks serve a traditional role on the public streets. As the modern successor to the news hawkers on the streets of the past, newsracks disseminate the facts and opinions that inform and encourage debate on matters of public concern. Newsracks on the public streets are a critical part of this most traditional public forum. As such, they may be regulated only in a manner that is consistent with the communicative purposes of public forums in general, and with the traditional nature of streets and sidewalks in particular. *See Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800 (1985); *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

II. RESTRICTIONS ON DISTRIBUTION OF COMMERCIAL SPEECH BY NEWSRACKS MUST BE CONSISTENT WITH THE FIRST AMENDMENT

A. Distribution of Commercial Speech Serves Important First Amendment Values

The City of Cincinnati attempts to draw a bright line between "non-commercial" and "commercial" speech and bans the latter from the public street. This rigid definitional approach is reminiscent of *Valentine v. Chrestensen*, 316 U.S. 52 (1942). In fact, the Cincinnati ordi-

nance at issue is substantially identical to the New York ordinance upheld in *Valentine*, both banning distribution or "throwing" of commercial "handbills" in public places. *See Valentine*, 316 U.S. at 53 n.1. Although the justification for such a ban is now described in terms of "aesthetics," there is very little difference between the City's position today and the conclusory rationale of the *Valentine* Court fifty years ago:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.*

316 U.S. 52, 54 (1942) (emphasis added).

This Court has since rejected as "simplistic" the notion that speech may be denied First Amendment protection solely because it is "commercial speech." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (1976). Even before *Virginia State Board*, the statement in *Valentine* itself was characterized by members of the Court as "casual, almost offhand," and one "of doubtful validity" that "has not survived reflection." *Id.* at 759 n.16. *See Bigelow v. Virginia*, 421 U.S. 809, 820 n.6 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting); *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

Distribution of commercial information serves important social values protected by the First Amendment. As the Court noted in *Virginia State Board*, 425 U.S. at 763, 765:

> As to the particular consumer's interest in the free flow of commercial information, that interest

> may be as keen, if not keener by far, than his interest in the day's most urgent political debate.
>
> . . . .
>
> [A]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [Citations omitted.] And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Obviously, not all commercial speech carries such weighty implications, but even a cursory review of the commercial speech cases that have reached this Court indicates the strong public interest in subject matter that may be characterized as "commercial". *See, e.g., Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990), *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (attorney advertising); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) and *Carey v. Population Services International*, 431 U.S. 678 (1977) (birth control information); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (abortion clinic services); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (public utility services); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (real estate advertising—racial "blockbusting"); *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, *su-*

pra (prescription drug prices). These commercial topics are certainly more important to readers than the non-commercial fully-protected "news" that appears in some grocery store tabloid publications.

Clearly, commercial speech is a valuable component of the marketplace of ideas and is entitled to protection under the First Amendment. The degree of protection does, and should, vary according to the purpose and circumstances of the speech, but it is clear, at very least, that the value of even purely commercial speech cannot be dismissed solely on the basis of the generalized label "commercial," which is exactly what the Cincinnati ordinance would do.

B. Under Any Test, Restrictions on Distribution of Commercial Speech Must Be Weighed Against First Amendment Burdens

All parties below apparently agreed that the City's attempted ban on commercial newsracks must meet the four-part test set out by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). Assuming (1) lawful commercial speech, the remainder of the test requires that the proposed restriction (2) promote a substantial governmental interest; (3) directly advance that interest; and (4) be no more extensive than is necessary to serve the substantial govermental interest.

The Court refined its interpretation of the fourth part of the test in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), expressly rejecting the interpretation that government must adopt the "least restrictive means" in order to pass the *Central Hudson* test. Instead, the Court sought a "reasonable fit" between the substantial interests to be served and the restrictions imposed. In the words of the Court, a "reasonable fit" is:

> [one] that represents not necessarily the single best disposition, but one whose scope is "in proportion to the interest served". . . . Here we require the government goal to be substantial, and the cost to be carefully calculated.

Fox, 492 U.S. at 480 (quoting *In Re R.M.J.*, 455 U.S. 191, 203 (1982)).

Even with these refinements, reasonable minds may differ over interpretation of the test itself, and certainly over its application to the Cincinnati commercial newsrack ban. The City claims that it satisfies the test by banning "no more speech than is necessary" to serve aesthetic and public safety goals. The Court of Appeals, on the other hand, found no "reasonable fit" where the City could have addressed these goals without banning the Respondents' use of newsracks.

Amici will leave to the parties the argument of whether the City's record in this case is sufficient to meet the requirements of *Central Hudson*. What is more important in the long run is that this Court insist on careful scrutiny of the facts and application of the test by the lower courts.

The City and other amici argue from language in *Fox* and *Metromedia* that cities' judgment in these matters should be given great deference and that "we [should] leave it to the governmental decision makers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480. These arguments lose sight of the fact that the tests in *Central Hudson*, *Fox*, and other commercial speech decisions of this Court are *constitutional* standards which define the limits of regulation of speech and speech-related activities. As Justice Stevens observed in *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 108 (1990), it is the unavoidable responsibility of the courts to review legislative activity in this arena.[27]

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[27] Responding to Justice O'Connor's view that "we should be more deferential" to the State, Justice Stevens observed: "Whether the inherent character of a statement places it beyond the protection

The facts below emphasize the need for searching judicial review of these determinations. According to the Findings in the District Court, Respondents' appeals from the revocation of their newsrack permits were heard by the City Engineer, the Assistant City Solicitor, and the Director of Public Works, all persons who had participated directly in the original decision to revoke the permits. Moreover, governmental determinations under the ordinance on which they relied required no expertise in matters of public safety or aesthetics and no special familiarity with matters particular to the City of Cincinnati—in short, nothing to which any court need defer, except under the most mechanistic standard of deference. It was an outdated anti-litter ordinance that simply banned distribution of commercial handbills. Under such circumstances, there is particular need for objective application of constitutional standards by the courts, if the test in *Central Hudson* is to have any meaning at all.

The Court of Appeals below was correct in its reading of *Fox* to require careful weighing of speech values against the benefits of asserted regulation:

> We presume that the cost referred to by the *Fox* Court is that which would accrue because of the burden placed on the commercial speech, and that the *Fox* test requires that such costs must be outweighed by the benefits of the asserted regulation.

Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464, 468 (6th Cir. 1991). Although the newspaper amici may not agree with the exact weight the Court of Appeals assigns to commercial speech in the present context, there is no question that *Central Hudson* and *Fox* both require careful First Amendment consideration of the burdens of any governmental restriction on speech, and that it is the courts, and not the regulators, who ultimately must determine the proper constitutional balance.

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of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review." Peel, 496 U.S. at 108.

In the present case it seems obvious that Respondents' publications were banned from the Cincinnati streets because they were simply pigeonholed as "commercial handbills" under the ordinance. There was no apparent consideration given to alternatives under *Central Hudson*, *Fox*, or any other variation of the commercial speech doctrine recognized by this Court.

C. In Allocating Newsstand Space, Cities May, Consistent With the First Amendment, Give Preference to Daily Newspapers

Although the City speaks in terms of aesthetics and safety, and struggles to spell out an after-the-fact rationalization under *Central Hudson*, its underlying concern is obviously one of numbers. Indeed, if safety and aesthetics were the real concerns, the Court of Appeals' suggested regulatory alternatives to a total ban would be more than adequate to protect the City's interests. It is instead an underlying fear of too many newsracks crowding the street corners that leads the amici cities to urge a total ban on all newsracks:

> The City has a legitimate concern that if dispensers of the kind used by respondents are allowed to remain in place they will soon proliferate to the point where they will cause major adverse effects on the City's appearance and on the free and safe flow of pedestrian and vehicular traffic. . . . [R]espondents are only two of a virtually unlimited number of potential publishers of commercial handbills.

Brief of U.S. Conference of Mayors at 21.

Certainly, if this spontaneous proliferation of newsracks were to materialize, the cities' concerns about safety and aesthetics might be well founded. But the cities' insistence on the constitutional right to ban all newsracks on public property as a solution to these prospective fears ignores the wide range of time, place, and manner regulations constitutionally available to the cities. More fundamentally, it overlooks the fact that the "property"—the public

street—was used as a public forum for dissemination of opinion, information, *and newspapers* long before the flow of vehicular traffic was a governmental concern.

The cities would agree, in fact they argue in their brief, that "preserving public property for its intended use" is a "substantial governmental interest". Brief of U.S. Conference of Mayors at 7. It should therefore be clear that one thing government *cannot* do in the interest of "protecting the public's property" is prevent the intended use of the public streets as a traditional public forum and source for news and information.

If the space available for newsracks is or becomes truly limited, cities will have to decide how and by whom the limited space is to be used, and this admittedly may raise its own constitutional dilemmas. One the one hand, the allocation criteria must be content neutral under *Lakewood*. *See* 486 U.S. at 760 ("the Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint. . . ."). On the other hand, the City is probably correct in its rejection of the Court of Appeals' totally random first-come first-served or auction approaches. *See* Brief of Petitioner at 26.

However, the answer is not, as the City here has done, to engraft an obsolete (and probably unconstitutional) prohibition against commercial handbills onto its "law of newsracks." As the record strongly suggests, this is hardly a comprehensive or practical solution if it affects less than five percent of the city's newsracks. It also fails to take into account publications that "do more than propose a commercial transaction" [28] and thus cannot be so easily dismissed as merely "commercial."

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[28] *See, e.g., City of New York v. Learning Annex, Inc.*, 150 Misc.2d 791, 571 N.Y.S.2d 380 (N.Y. Sup. Ct. 1991), which raises legitimate questions as to whether Respondents' publication should even have been classified as "commercial" in the first place.

The newspaper amici submit that the answer lies in careful application of time, place, and manner regulation, which permits reasonable restrictions:

> [P]rovided the restrictions "are justified without regard to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). These and other recent decisions of this Court suggest that well-justified preferences among categories of publications are possible, if not exercised for the *purpose* of suppressing or favoring particular views. *See Ward*, 491 U.S. at 791; *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986); *Clark*, 468 U.S. at 295; *Leathers v. Medlock*, 499 U.S. ——, 111 S.Ct. ——, 113 L.Ed.2d 494, 503 (1991).[29]

The actual need for restrictions and their scope—i.e., whether they are "narrowly tailored to serve a significant governmental interest"—should be determined on a fact-specific, case-by-case basis subject to judicial review, as discussed at p. 23 *supra*. However, if a city can satisfy these constitutional thresholds, the First Amendment does not require that allocation of scarce newsrack space be turned into a random lottery, with no regard for the

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[29] There is an intuitive logic to the theory that distinguishing among different *categories* of speech (e.g., commercial speech) may still be "content-neutral" and is not the same as discriminating on the basis of *viewpoints*. However, there is also great potential for abuse of such a standard and a need for judicial vigilance, to insure that prohibited suppression of viewpoints is not disguised as mere distinctions among categories. *See also* Justice Kennedy's caution against applying mechanical balancing rules to test clearly impermissible content regulation, in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. ——, 112 S.Ct. 501, 116 L.Ed.2d 476, 492 (1991) (Kennedy, J., concurring).

needs and interests of the reading public, or the newspapers' central role in this traditional public forum.

The final and most critical point for analysis of time, place, and manner regulation is whether there are "ample alternative channels for communication of the information," which requires a "particularized inquiry" into the nature of the forum, *see Metromedia*, 453 U.S. at 503, and carries with it the corollary that the alternatives must be reasonably effective. *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977).

When this test is applied to restrictions on newsracks, it is obvious that daily newspapers occupy a unique position. Not only is the public street the traditional forum for dissemination of news of the day, but there is no effective alternative forum that provides the immediacy and mass communication that are the hallmarks of daily newspapers. Virtually all other types of publications, including those of Respondents, have other effective means to reach their respective audiences, but the public increasingly relies, and is entitled to rely, on the newsrack as the most immediate and effective source of daily news, the linchpin between public events and public debate.[30]

To summarize, amici submit that the answer is neither to rescind all First Amendment protection for commercial speech, as the Cincinnati ordinance would do; nor is it to categorically ban newsracks from the public streets, as the amici cities urge. Both extremes would be unconstitutional. The First Amendment, history, and common sense all point to the same solution—if newsrack space is limited, cities may, indeed should, give preference to continued use of the public ways for effective distribution of daily news.

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[30] A similar distinction was suggested by Justice Kennedy in his concurrence in *Kokinda, supra*, 111 L.Ed.2d at 589. Discussing the time, place, and manner test set forth in *Ward, supra*, he observed that, at least in a non-public forum such as post office facilities, the First Amendment permits lower protection for in-person solicitation of funds than for expressive activities.

CONCLUSION

The Court has consistently recognized the difficult but essential balance between constitutional protection of speech and press, on the one hand, and legitimate regulatory concerns, on the other. Amici curiae respectfully submit that in the present case, the balance should be struck in favor of the widest availability of information, both commercial and non-comercial. But whatever else cities may appropriately do to accommodate the goals of aesthetics and public safety, they must recognize and preserve the historic use of the public streets as a public forum for distribution of the news of the day.

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